Razak bin Abu v Public Prosecutor

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 42–73 OF 2004
NALLINI PATHMANATHAN JC
26 MARCH 2008

Criminal Law — Penal Code (Malaysia) — s 467 — Accused charged for forging cheques — Whether there had been failure to undertake maximum evaluation of evidence

Criminal Procedure — Sentence — Principles of sentencing — Forgery of cheques — Fine of RM40,000 for forging cheques totaling RM37,745.39 — Fine imposed 'reflected' amount of loss caused to victim — Whether sound basis for imposition of fine

Evidence — Circumstantial evidence — Inferences from facts — Whether appellant forged signature on cheques — Expert evidence concluded signatures forged but could not give opinion whether matched appellant's handwriting

The appellant was convicted on a charge of forging documents which purported to comprise valuable security, namely 15 cheques belonging to one Afizah bte Ibrahim ('SP1') totaling RM37,745.39 which sum of money he employed for his own use, in contravention of s 467 of the Penal Code ('the Code'). He was sentenced to two weeks imprisonment and a fine of RM40,000 in default of which a term of five years' imprisonment was imposed. He appealed against both his conviction and sentence. The primary issue for consideration in this appeal was whether the appellant had in fact, forged the subject cheques by placing a signature purporting to be that of SP1 on those 15 cheques. SP1 testified that she agreed to apply for an overdraft facility to assist the appellant and SP2 (who was SP1's brother) to facilitate their company, Hazeltron to commence business. The said cheques were issued and the proceeds collected or utilised between the months of May and August 1996 even though Hazeltron did not have any business or any projects whatsoever between the years 1995 and 1997. SP1's evidence was corroborated in one crucial particular by a handwriting expert ('SP8') who concluded that the signatures on the 15 cheques comprising the subject matter of the case did not belong to SP1, but could not give an opinion as to whether the signatures on the forged cheques matched the appellant's handwriting. However the appellant maintained that he had at all times given

the cheques to SP2 who procured SP1's signature on the subject cheques. The trial judge accepted SP1 and SP2's evidence while rejecting that of the appellant. The learned trial judge found that the subject cheques were utilised for the appellant's personal upkeep and not for the purposes of Hazeltron, particularly as Hazeltron was not functional during the relevant period. The appellant had also admitted that some of the cheques were deposited into his wife's business account but failed to account for the same. Similarly there was a failure to account for the cheques that he had encashed. Accordingly, the learned trial judge concluded that the appellant's testimony amounted to a mere denial that he had forged SP1's signature. The appellant contended that the essential ingredients in respect of an offence under s 467 of the Code had not been made out as the prosecution had not proven that the appellant was the one who had signed the cheques comprising the subject matter of the charge. In this context the appellant maintained that the trial judge had failed to adequately consider the evidence of the handwriting expert, SP8, who was unable to express an opinion as to whether the signatures on the subject cheques were likely to have been made out by the appellant. In short he maintained that the prosecution had not proved 'forgery'.

Held, allowing the appeal in part:

(1) In the absence of direct evidence it was open to the court to rely on circumstantial evidence to aid it in arriving at a conclusion. It had not been proved that the signatures purporting to be that of SP1 were made by the appellant (see paras 35–39).

(2) The circumstantial evidence, expert evidence and documentary evidence considered in totality established that the learned trial judge did not err in arriving at her conclusion of guilt vis a vis the appellant in relation to the charge against him under s 467 of the Code (see para 48).

(3) The basis for the imposition of a fine of RM40,000 was that the appellant had caused grave financial loss to SP1, a reasoning which was less than clear. The grave financial loss suffered by SP1 would not be compensated by the imposition of a fine for RM40,000, as SP1 was not the beneficiary of the fine. In order for SP1 to recover her loss, a civil suit would have to be instituted to recover the monies she had lost. The fact that the fine 'reflected' the amount of loss caused did not appear to be a sound basis for the imposition of such a sum (see paras 58–60).

(4) As there appeared to be no tenable basis for the imposition of that part of the sentence relating to the fine and the term of imprisonment in default of the payment of such fine, this court was constrained to set aside that portion of the sentence and substitute instead, a fine of

RM5,000 and in default of payment of such fine, a term of imprisonment of three months (see para 61).

[Bahasa Malaysia summary

Perayu disabitkan atas pertuduhan memalsukan dokumen-dokumen yang kononnya melibatkan sekuriti yang bernilai, iaitu 15 cek-cek kepunyaan Afizah bte Ibrahim ('SP1') yang berjumlah RM37,745.39 yang mana digunakannya untuk dirinya sendiri, bertentangan dengan s 467 Kanun Keseksaan ('Kanun'). Beliau dihukum dua minggu penjara dan denda sebanyak RM40,000 dan jika ingkar, penjara selama lima tahun akan dikenakan. Perayu merayu terhadap sabitan dan hukuman. Isu utama untuk dipertimbangkan dalam rayuan ini ialah sama ada perayu telah sebenarnya memalsukan cek-cek tersebut dengan menandatangani seperti tandatangan SP1 atas 15 cek-cek tersebut. SP1 memberi keterangan bahawa beliau bersetuju memohon untuk satu kemudahan overdraf untuk membantu perayu dan SP2 (iaitu adik SP1) untuk membolehkan syarikat mereka, Hazeltron memulakan perniagaan. Cek-cek tersebut dikeluarkan dan hasilnya diambil atau digunakan di antara bulan Mei dan Ogos 1996 walaupun Hazeltron tiada sebarang perniagaan atau projek di antara tahun-tahun 1995 dan 1997. Keterangan SP1 juga disokong atas perkara penting oleh pakar tulisan ('SP8') yang telah memutuskan bahawa tandatangan di atas 15 cek-cek yang membentuk perkara pokok kes tersebut bukan kepunyaan SP1, tetapi tidak dapat memberi pendapat sama ada tandatangan di cek-cek yang dipalsukan tersebut adalah sama dengan tulisan perayu. Walau bagaimanapun perayu menegaskan bahawa pada setiap masa beliau telah memberikan cek-cek tersebut kepada SP2 yang mendapatkan tandatangan SP1 atas cek-cek tersebut. Hakim perbicaraan menerima keterangan SP1 dan SP2 dan menolak keterangan perayu. Hakim perbicaraan yang bijaksana mendapati bahawa cek-cek tersebut digunakan untuk kegunaan sendiri perayu dan bukannya untuk tujuan Hazeltron khususnya apabila Hazeltron tidak berfungsi pada masa tersebut. Perayu juga mengakui bahawa beberapa cek yang telah didepositkan ke akaun perniagaan isterinya tetapi gagal untuk memperjelaskannya. Begitu juga kegagalan menjelaskan cek-cek yang telah diambil wangnya. Dengan itu, hakim perbicaraan yang bijaksana telah memutuskan bahawa keterangan perayu hanya merupakan penafian semata-mata bahawa beliau telah memalsukan tandatangan SP1. Perayu menegaskan bahawa kandungan yang penting berhubungan dengan kesalahan di bawah s 467 Kanun tersebut tidak dibuktikan oleh kerana pihak pendakwaan tidak membuktikan bahawa perayu merupakan orang yang menandatangani cek-cek yang membentuk perkara pokok tuduhan tersebut. Dalam konteks ini, perayu menegaskan bahawa hakim perbicaraan telah gagal untuk menimbangkan dengan sewajarnya keterangan pakar tulisan, SP8, yang tidak dapat memberi

A pendapat sama ada tandatangan di atas cek-cek tersebut adalah berkemungkinan dibuat oleh perayu. Pendek kata, beliau menegaskan bahawa pihak pendakwaan telah gagal membuktikan 'pemalsuan'.

B **Diputuskan**, membenarkan sebahagian rayuan:

(1) Dengan ketiadaan keterangan langsung ia adalah terbuka kepada mahkamah untuk bergantung kepada keterangan ikut keadaan untuk membantunya mencapai satu keputusan. Ia tidak dibuktikan bahawa C tandatangan-tandatangan yang kononnya kepunyaan SP1 telah dibuat oleh perayu (lihat perenggan 35–39).

(2) Keterangan ikut keadaan, keterangan pakar dan keterangan dokumentari dipertimbangkan secara keseluruhan menunjukkan D bahawa hakim perbicaraan yang bijaksana tidak terkhilaf dalam mencapai keputusannya mengenai kesalahan vis a vis perayu berhubungan dengan tuduhan terhadapnya di bawah s 467 Kanun Keseksaan (lihat perenggan 48).

E (3) Asas pengenaan denda RM40,000 adalah bahawa perayu telah menyebabkan kerugian dari segi kewangan kepada SP1. Alasan yang diberikan adalah kurang jelas. Kerugian dari kewangan yang dialami SP1 tidak dapat dipampas melalui denda RM40,000, oleh kerana SP1 bukannya penerima denda tersebut. Untuk membolehkan SP1 F mendapatkan kembali kerugiannya, satu tindakan sivil sepatutnya dimulakan untuk mendapat kembali kerugian yang dialaminya. Fakta bahawa denda 'mencerminkan' jumlah kerugian yang dialami tidak nampak seperti asas yang kukuh untuk mengenakan jumlah sedemikian (lihat perenggan 58–60).

G (4) Oleh kerana tiada asas yang boleh diterima dalam mengenakan bahagian hukuman yang berhubung dengan denda dan jika ingkar, tempoh penjara yang dikenakan, mahkamah ini terpaksa mengenepikan bahagian hukuman tersebut dan menggantikannya H dengan denda sebanyak RM5,000 dan jika ingkar membayar denda tersebut, tempoh penjara selama tiga bulan (lihat perenggan 61).]

Notes

For cases on inferences from facts, see 7(1) *Mallal's Digest* (4th Ed, 2006 I Reissue) paras 629–631.

For cases on principles of sentencing, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3944–4039.

For cases on s 467 of the Penal Code (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1969–1970.

Cases referred to

AEG Caraoeit v AY Derderaian AIR 1961 Cal 359 (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (folld)
Bank of India v Yeturi Maredi Shanker Rao 1987 Cri LJ 722 (refd)
Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
State (Delhi Administration) v Pali Ram AIR 1979 SC 14 (refd)
Tan Chow Soo v Ratna Ammal [1969] 2 MLJ 49 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Evidence Act [India] s 73
Evidence Act 1950 ss 45, 47, 73
Penal Code s 467
Penal Code [India] ss 463, 464, 467

Ramesh K Supramaniam (George Varughese & Co) for the appellant.
Azhar Irwan bin Mod Ariffin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nallini Pathmanathan JC:

[1] Razak bin Abu, the appellant in this appeal, was convicted on a charge of forging documents which purported to comprise valuable security, namely 15 cheques belonging to one Afizah bte Ibrahim ('SP1') totaling RM37,745.39 which sum of money he employed for his own use, in contravention of s 467 of the Penal Code. He was sentenced to two weeks imprisonment and a fine of RM40,000 in default of which a term of five years' imprisonment was imposed. He appeals against both his conviction and sentence. The sentence has been stayed pending this appeal.

[2] The primary issue that arises for consideration in this appeal is whether the appellant had in fact, forged the subject cheques by placing a signature purporting to be that of SP1 on those 15 cheques.

MATERIAL FACTS

[3] In September 1995, the appellant, one Hamzah bin Ibrahim ('SP2') who is SP1's brother, and one Yuaz bin Kassim incorporated a company known as Hazeltron Sdn Bhd to carry out general trading and to make tools. No business was conducted despite it having been incorporated, because there was no capital or funding to enable it to operate a business. The

appellant and SP2 therefore sought the assistance of SP2's father, one Ibrahim Markaya (who is also SP1's father) and SP1, his sister. SP2's father, while having no monies to loan to Hazeltron Sdn Bhd, agreed to allow his house to be charged to a financial institution to enable the procurement of a loan. The appellant intimated that he could arrange for the procurement of a loan on the basis of such collateral. However, as neither he nor SP2 were in active employment they needed to find someone with a fixed income to apply for the loan. For this they turned to the appellant's sister, SP1 who was employed. The appellant arranged for the procurement of a loan in the form of an overdraft facility from EON Bank ('the overdraft facility') against the collateral of the house belonging to SP1's father.

THE COMPLAINANT, SP1'S EVIDENCE

[4] SP1 testified that she agreed to apply for an overdraft facility to assist the appellant and SP2 to facilitate their company, Hazeltron to commence business. SP1 consented to assist in their venture as SP2 is her brother and the appellant is related and was known to her for some time. She was clear in her testimony, however, that the overdraft facility once granted, would not actually be utilised or drawn-down. The existence of the overdraft facility was to give assurance to potential clients that Hazeltron had sufficient funding for its business. SP2's evidence while largely consistent with that of SP1, differed in one aspect. He maintained that the overdraft facility was procured to facilitate Hazeltron in its business, and that monies could, with the authorisation of SP1, be utilised for that purpose. However Hazeltron did not have any business or any projects whatsoever between the years 1995 and 1997. The cheques comprising the subject matter of the charge were issued and the proceeds collected or utilised between the months of May and August 1996. Accordingly there was no reason for the utilisation of the overdraft facility for the purposes of Hazeltron's business in 1996 when the subject cheques were issued and encashed.

[5] SP1 applied for the overdraft facility in early 1996 from EON Bank ('the bank'). It is not in dispute that the appellant was the one who procured the application form and took the various particulars from SP1, the applicant and her husband, Ahmad Razlan Akmat who was the guarantor for the facility, filling in the application form for them. The appellant submitted the application on behalf of SP1. There were two addresses stipulated in the application, namely SP1's home address and the office address of the appellant. In or around 1 March 1996 the bank advised SP1 that it had approved her application for the facility. SP1, SP2 and the appellant went to the bank soon after receipt of the letter of offer and SP1 executed the relevant documentation consenting to the terms and conditions for the grant of the facility. Again it was the appellant who filled in the account application form

and applied for a current account on behalf of SP1. Such an account was necessary to operate and utilise the overdraft facility. There were two addresses provided in the application form, a mailing address and a permanent home address. The former was filled in with the appellant's office address while the latter reflected SP1's home address. Accordingly all the correspondences relating to the account was sent to the appellant's office address. The security for the facility was SP1's home in Cheras Indah which by then, had already been transferred by her father to SP1. SP1 duly executed the relevant documentation to charge the house to the bank as required under the terms and conditions for the grant of the facility. SP1 also signed a specimen signature card for the bank.

[6] The overdraft facility became operational after this. However SP1 neither utilised the facility directly nor received any correspondence from the bank until about a year later, in May 1997. Soon after the account became operational, however, the appellant showed up at SP1's then office in Petaling Jaya with two blank cheques. He asked her to sign the blank cheques, stating that they were required for payment of insurance for the charged property as well as legal fees. When SP1 queried him as to why no amounts were filled in on the two cheques and asked what the total amount due was, he explained that he did not know the amount yet. As both the payments appeared to be necessary for the purposes of the overdraft facility, and as SP1 trusted the appellant she signed both cheques. These two cheques do not comprise the subject-matter of the charge against the appellant. It is pertinent that according to SP1, the appellant did not come to see her with a cheque book, but instead merely produced two blank cheques. SP1 maintained that she never received any cheque books from the bank. After this SP1 did not have any further dealings with the account.

[7] In May 1997, SP1 heard directly from the manager of the bank, one Low Leh Kiong ('SP5') that the overdraft facility in the sum of RM76,000 had been fully drawn down and interest payments were overdue. SP1 was astounded as she had not withdrawn a cent nor received any monies from the facility, save for the two cheques she had signed. She was told that a series of cheques had been made out and the overdraft facility completely utilised. SP1 however maintained that she had at no time been in possession of cheque books to enable such utilisation of the facility.

[8] SP1 then asked to be furnished with all the relevant correspondence and documents relating to the utilisation of her account. She found that upon approval of the overdraft facility having been granted, the appellant who had filled in the loan application form for SP1 had applied for a current account. Cheque books had been issued in SP1's favour and the appellant had collected those cheque books. The mailing address on the application was the

appellant's office address, and accordingly all correspondences had been sent there. SP1 testified that apart from the two cheques which the appellant had brought along for her to sign, she had no knowledge of the making of any other cheques. Neither had she signed any further blank cheques. She explained that she had consented to signing the first two cheques because they related to legal fees incurred in order to affect a charge of the house and for insurance for the property.

[9] Once SP1 had garnered the relevant facts, SP1 together with SP2, confronted the appellant. According to SP1 and SP2, the appellant admitted that he had forged SP1's signature on the subject cheques. He stated that he had been forced to do so because it was difficult to meet up with SP1. He promised to make good the sum including the amounts in the first two cheques that she had signed herself. However this was not to be. SP1 and SP2 heard nothing more from the appellant. Finally SP1 lodged a police report. Hence the aforesaid charge was preferred against the appellant.

THE HANDWRITING EXPERT

[10] SP1's evidence was corroborated in one crucial particular by a handwriting expert, Wong Kong Yong ('SP8'). He concluded after examining 36 pages of specimen handwriting from SP1 as well as her original signature on the first two cheques she admitted signing, and 81 pages of the appellant's specimen handwriting procured over a similar period of time that:

(i) the signatures on the 15 cheques comprising the subject matter of the case did not belong to SP1;

(ii) SP8 could not give an opinion as to whether the signatures on the forged cheques and one receipt from EON Bank originated from or matched the appellant's handwriting, when he compared the eighty one pages of script from the appellant against the said cheques;

(iii) the handwriting of the particulars on the forged cheques matched the handwriting of the appellant.

The expert therefore concluded that SP1 had not signed the 15 cheques comprising the subject matter of the charge.

BANK WITNESSES

[11] Several witnesses were called from the bank to testify as to the opening of the account and its conduct. It was evident that while Afizah had authorised the opening of the account and signed the application for the opening of an account and the requisite specimen signature card there had

been no direct contact between the bank's officers and SP1 after that date until SP5's conversation with SP1 in May 1997.

[12] They confirmed that the overdraft facility was operated through the opening of a current account and that all correspondence had been sent to the mailing address on the application form namely the appellant's office address on the application form namely the appellant's office address.

THE APPELLANT'S EVIDENCE

[13] After hearing the prosecution's case, the learned trial judge who took over the conduct of this trial after four witnesses had given evidence before another trial judge, concluded that a prima facie case had been made out and called for the accused to enter defence.

[14] In his evidence, the appellant did not dispute the following facts, namely that:

(a) he had filled in the particulars on the 15 cheques comprising the subject matter of the charge;

(b) he had made out four of the 15 cheques in favour of his wife's trading company, one Perniagaan Anggi, encashed seven of the 15 cheques and made out the remaining four cheques in favour of third parties who had no connection whatsoever with Hazeltron Sdn Bhd;

(c) he had collected the cheque books from the bank.

[15] However the appellant went on to testify that each and every one of the subject cheques had been authorised by SP1 who had signed those cheques. He maintained that he had at all times given the cheques to SP2 who procured SP1's signature on the subject cheques. It should be noted that the defendant's contentions were not put to SP2 in the course of his cross-examination. It was put to SP1 that she had authorised and signed the subject cheques.

[16] In the further course of his evidence the appellant also admitted that it was not true that Hazeltron had been operated as a business on the basis of the overdraft facility afforded by SP1. He also conceded as stated by SP2 that Hazeltron had never been in operation. He however maintained that SP1 had authorised the utilisation of the entire facility to help him and SP2 in other construction ventures they had, which did not include the business of Hazeltron.

THE TRIAL JUDGE'S DECISION

[17] In her judgment the trial judge accepted SP1 and SP2's evidence while

rejecting that of the appellant. She found SP1 to be a forthright witness whose credibility was not damaged during the course of cross-examination. With respect to SP2 she concluded that despite minor discrepancies his evidence essentially verified that of SP1. She utilised that part of the handwriting expert's evidence that concluded that the signatures on the subject cheques were not that of SP1. As for the appellant, the learned trial judge found that the subject cheques were utilised for the appellant's personal upkeep and not for the purposes of Hazeltron, particularly as Hazeltron was not functional during the relevant period. The appellant had also admitted that some of the cheques were deposited into his wife's business account but failed to account for the same. Similarly there was a failure to account for the cheques that he had encashed. Accordingly, the learned trial judge concluded that the appellant's testimony amounted to a mere denial that he had forged SP1's signature. The trial judge made the following salient finding of fact:

> ... In addition the court was unable to accept the appellant as a witness of truth. At one point he said he was doing administrative work only for Hazeltron in spite of having told the court that he and Hamzah Ibrahim were partners and running the business. His attempts to explain his version had instead manifested how he deliberately used the OD facility for his own interest. The money was actually used to finance his personal upkeep and his own business ventures.
>
> The court noted his demeanour in the witness box and had seen how he faltered not only under cross-examination. Even his testimony in examination in chief was not consistent. His attempt to avoid answering questions from the prosecution led the court having to ask him the questions. This had compelled him to give an answer, which in essence admitting using the OD facility for himself not for Hazeltron.

THE GROUNDS OF APPEAL

[18] Although several grounds of appeal were raised in the petition of appeal, learned counsel for the appellant, Mr Ramesh condensed these grounds as follows:

(i) He contended that the essential ingredients in respect of an offence under s 467 of the Penal Code had not been made out as the prosecution had not proven that the appellant was the one who had signed the cheques comprising the subject matter of the charge. In this context he maintained that the trial judge had failed to adequately consider the evidence of the handwriting expert, SP8 who was unable to express an opinion as to whether the signatures on the subject cheques were likely to have been made out by the appellant. In short he maintained that the prosecution had not proved 'forgery'.

(ii) Learned counsel further submitted that there had been a failure to undertake a maximum evaluation of the evidence as a consequence of

which major contradictions in the testimonies of SP1 and SP2 had been overlooked.

ISSUES IN THIS APPEAL

[19] As stated at the outset the primary issue for consideration in this appeal is whether the appellant had in fact, forged the subject cheques by placing a signature purporting to be that of SP1 on those 15 cheques.

[20] This in turn invites a consideration of the manner of proof of a charge of forgery.

[21] The further issue that falls for consideration as set out in the grounds of appeal is whether indeed, there were such contradictions in the evidence of some of the key witnesses, SP1 and SP2, as warranted a rejection of their testimony as a whole. Prior to a consideration of these issues however, the ingredients required to satisfy a charge under s 467 of the Penal Code are considered.

INGREDIENTS OF AN OFFENCE UNDER SECTION 467 OF THE PENAL CODE

[22] Section 467 of the Penal Code provides as follows:

> ... *Whoever forges a document which purports to be a valuable security* or a will, or an authority to adopt a son, *or which purports to give authority to any person* to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or *to receive or deliver any money*, movable property, or valuable security, or any document purporting to be an acquittance or receipt, acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, *shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.*

[23] The essential ingredients of the offence which need to be established by the prosecution are that:

(i) the appellant must have forged a document; and

(ii) the document must be one of the classes specified in the section, (see *Ratanlal & Dhirajlal's Law of Crimes* (3rd Ed) at p 2346; *A Practical Handbook on Criminal Prosecution in the Subordinate Courts* (2000) by Teo Say Eng at p 336).

[24] 'Forgery' in turn is defined in s 463 of the Penal Code as follows:

> Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person or to support any claim or title or to cause any person to party with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed commits forgery.

[25] The definition of 'making a false document' is set out in s 464 of the Code. The relevant part of the said section reads as follows:

> A person is said to make a false document —
>
> > First — *Who dishonestly or fraudulently makes, signs*, seals, or executes *a document or part of a document*, or makes any mark denoting the execution of a document, *with the intention of causing it to be believed that such document was made, signed*, sealed or executed *by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed*, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed; ...
>
> (Emphasis added.)

Issue 1: Did the appellant forge the 15 cheques comprising the subject matter of this charge?

[26] From the foregoing definitions in the Penal Code, it is evident that the issue of the forgery of the 15 cheques may be ascertained by considering whether the appellant did 'dishonestly or fraudulently' make or sign the subject cheques, or even a part of those cheques with the intention of causing it to be believed that such cheques were made by SP1, when he knew that she did not at any time sign or make out those cheques. Neither had she at any time authorised the issuance or utilisation of those cheques.

[27] This in turn begs the question of how 'forgery' or the dishonest or fraudulent making out or signing of the subject cheques may be proven. Under s 45 of the Evidence Act 1950 the opinion of a handwriting expert as to the genuineness of handwriting or signatures are expressly admissible on the grounds that this is a relevant fact. The evidence of SP8, the handwriting expert is therefore both admissible and relevant. Section 47 of the Evidence Act 1950 provides for the admissibility of the evidence of a witness on the genuineness of handwriting where that witness can be said to be acquainted with the person stated to have written the disputed handwriting or signature. And s 73 of the Evidence Act 1950 allows the court or a witness to compare a disputed signature or handwriting with the genuine writing of the alleged writer. However all three sections prescribe great caution in undertaking such an exercise.

[28] In *State (Delhi Administration) v Pali Ram* AIR 1979 Supreme Court 14, Sarkaria J considered the various sections of the Indian Evidence Act which contains provisions similar to that of Malaysia. He held as follows in relation to the proof of the handwriting of a person: **A**

> ... Just as in English law, the Indian Evidence Act recognises two direct methods of proving the handwriting of a person: **B**
>
> (1) By an admission of the person who wrote it
>
> (2) By the evidence of some witness who saw it written.
>
> These are the best methods of proof. These apart there are three other modes of proof by opinion. They are: **C**
>
> (i) By the evidence of a handwriting expert (Section 45)
>
> (ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47) **D**
>
> (iii) Opinion formed by the court on comparison made by itself. (Section 73)
>
> All these three cognate modes of proof involve a process of comparison. In mode (i) the comparison is made by the expert of the disputed writing with the admitted writing of the person who is said to have written the questioned document. In (ii) the comparison takes the form of a belief which the witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned ... **E** **F**

[29] It is notable however that the Indian court went on to caution the utilisation of s 73 of the Indian Evidence Act which is similar to the Malaysian s 73 in the following terms: **G**

> ... Although there is no legal bar to the judge using his own eyes to compare the disputed writing with the admitted writing even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert. ... **H** **I**

[30] And as for the role of a handwriting expert, that too was carefully circumscribed by the Indian court as follows:

> ... It is not the province of the expert to act as judge or jury. As rightly pointed out in *Titli v Jones* ILR 56 All 428; AIR 1934 All 273 the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking such issues are for the court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence ...

[31] What was the evidence in this case in relation to the handwriting and signatures on the 15 disputed cheques? The 'best evidence' as outlined in the case above was not available. There were no eye witnesses who could testify as to the signatory of the cheques. And while SP1 and SP2 claimed that the appellant had admitted to them that he had signed the subject cheques, there was no such admission from the appellant either in his cautioned statement to the police or in court.

[32] The prosecution, and subsequently the trial judge, did however rely on the evidence of the handwriting expert, SP8 whose opinion was that:

(a) SP1's original signature as evidenced by the two original cheques which SP1 — admitted signing on the request of the appellant, did not match the signatures found the 15 cheques comprising the subject matter of the charge; in short, SP1 was not the signatory to those cheques. SP8 found that the elements of writing in the two sets of documents were different;

(b) However he went to state that he could not give an opinion as to whether the signatures on the 15 cheques originated from the person who had provided eighty one sheets of specimen handwriting, namely the appellant. In short he was unable to given an opinion as to whether the appellant had signed the 15 cheques so as to match SP1's signature.

(c) SP8 was able to conclude on the basis of a comparison of the handwriting on the particulars of the 15 cheques with the specimen handwriting handed in by the appellant that he had filled in the particulars of the cheques.

(d) The appellant in his defence conceded that he had filled in the particulars on the subject cheques. He however denied that the signatures on those cheques were made out by him.

[33] In justifying his conclusions, SP8 explained that he had considered contemporaneous documents of specimen signatures of SP1, the appellant as well as original documents signed by SP1 compared with the signatures on those 15 cheques. He further explained that he had made comparisons between the similar and different elements in the respective handwriting of these persons to arrive at an opinion with the assistance of forensic scientific techniques. Further details of the methodology utilised are set out in his evidence.

[34] The net result of SP8's evidence was to exclude SP1 as a signatory of the cheques. The trial judge accepted the expert's opinion in this matter and 16 having reviewed his evidence there appears to be no reason why his opinion should not be accepted. Indeed it is telling that the appellant's defence too is aligned along the same lines outlined by the expert, in that he admits that the handwriting of the particulars on the subject cheques, is his handwriting. It may safely be concluded from the foregoing that there was no direct evidence to prove that it was the appellant who had placed the signature purporting to be that of SP1 on those 15 cheques.

How is the court to ascertain proof of 'forgery' in the absence of a definitive opinion from the handwriting expert and direct evidence on this issue?

[35] In the absence of such direct evidence it is open to the court to rely on circumstantial evidence to aid it in arriving at a conclusion. In *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 277, it was said:

> ... It is also contended on behalf of the first appellant that P17A is documentary hearsay and that the handwriting and signature therein must be proved to be that of the first appellant. *The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in question must have signed or written it* (*Baru Ram v Prasanni* AIR 1959 SC 93) and a document can also be regarded as evidenced by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which could have been known only to the person to whom the authorship is attributed. *The execution or authorship of a document is a question of fact and may be proved like any other fact by direct as well as circumstantial evidence which must be of sufficient strength to carry conviction* (*Krishnabiharilal v State* AIR 1956 MB 86, at pp 90–91).
>
> (Emphasis added.)

[36] That circumstantial evidence may indeed be relied upon in the absence of direct evidence is borne out by the case of *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153 where Raja Azlan Shah J (as His Highness then was) concluded:

> ... I am satisfied that *there was a chain of evidence so far complete as not to leave any reasonable doubt as to the guilt of appellant No 2. The circumstantial evidence established that in all human probability the typing of exh 4C must have been done by him...*
>
> (Emphasis added.)

[37] Reliance on circumstantial evidence to prove 'forgery' is also borne out by the Indian case of *Bank of India v Yeturi Maredi Shanker Rao* 1987 Cri LJ 722 where a similar issue arose. In that case the accused was working as an accounts clerk in a bank and assisted the complainant with her banking transactions. Obtaining possession of her account book on a false pretext, he procured a third party to complete a withdrawal form on the complainant's account and withdrew monies which he received and utilised. It was proved that the signature on the withdrawal form was not that of the complainant. The signatures on the reverse of the form taken by the bank as acknowledgement was found to be that of the accused. It was not however proved that the signature on the withdrawal form was made by the accused. At first instance the accused was acquitted of the charges against him. However on appeal this decision was reversed and the accused convicted under, inter alia, s 467 of the Indian Penal Code which is similar to s 467 of the Penal Code. In so concluding the appellate court found that it had been clearly established that the accused used the forged document and on the basis of that document obtained money to which he had no claim and thereby caused wrongful gain to himself and wrongful loss to the complainant. The complainant used to take the assistance of the accused whenever she wanted to have any transaction in the bank and therefore it was concluded that he knew her signature well. It could not therefore be doubted that the accused utilised the withdrawal form knowing it to be forged or at least believed it to be forged.

[38] The appellate court in dealing with the offence under s 467 of the Indian Penal Code and notwithstanding the lack of direct proof that the accused was the one who had forged the signature on the withdrawal form stated as follows:

> ... the learned High Court acquitted the respondent because it came to the conclusion that there is no evidence to establish as to who forged the signatures of PW1 on the withdrawal form. *It is no doubt true that so far as the evidence about the forgery of the signatures of PW1 on the withdrawal form is concerned there is no evidence except the fact that the signatures are forged and the further fact that this withdrawal form was in the possession of the respondent accused who presented it in the bank and obtained money therefrom and pocketed the same. From these facts an inference could safely be drawn that it was the respondent-accused who got signatures of PW1 forged on this document as it was he who used it to obtain money from the bank from the account of PW1 and pocketed the same. It is no doubt true that there*

is no evidence as to who forged the signatures on the withdrawal form but the circumstances indicated above will lead to the only inference that it was the accused-respondent who got the signatures of PW1 forged on the withdrawal form. In this view of the matter therefore the acquittal of the respondent for an offence under s 467 read with s 109 also could not be justified ...

(Emphasis added.)

[39] In like manner in this case, it has not been proved that the signatures purporting to be that of SP1 were made by the appellant. The question that therefore arises for consideration is whether there is in the instant case a chain of evidence that is 'so far complete' that it enabled the trial judge to conclude without reasonable doubt that the appellant was guilty of forging SP1's signatures on the 15 cheques. In other words, is there a sufficient body of circumstantial evidence which affords a chain of evidence leading to the conclusion without reasonable doubt that the appellant is guilty of forging SP1's signatures on the 15 cheques.

[40] From the evidence adduced in the course of the trial and as summarised above, it is evident that:

(a) the appellant gave SP1 a guarantee/promise that he could procure an overdraft facility from a financial institution in her name for the purposes of affording an assurance to the customers of Hazeltron Sdn Bhd that it had sufficient capital to operate its business;

(b) the appellant was the one who organised and procured the facility for SP1. To this end, it was the appellant who collected the loan application form, filled it, asked SP1 to sign it with SP1's husband as the guarantor before submitting it to the financial institution;

(c) when the facility was approved, the appellant accompanied SP1 and SP2 to the bank where the relevant documentation was signed;

(d) the facility granted in the sum of RM76,000 was eventually operated through an overdraft facility. Again it was the appellant who filled in the application form, asked for a current account and placed his office address as the mailing address for the purposes of correspondence with the bank. SP1 merely signed the application and a specimen signature card.

(e) all correspondence from the bank was accordingly remitted to the appellant's office address;

(f) cheque books in the name of SP1 were collected by the appellant by his own admission.

(g) the fact that SP1 did not take possession of the cheque books is evidenced, inter alia, by the fact that the first two cheques which were

genuine cheques in that they were signed by her, were handed to her by the appellant for her signature in leaf form. She never had sight of the cheque books;

(h) the particulars of each of the 15 cheques was filled in by the appellant as opined by the handwriting expert, and significantly, admitted to by the appellant;

(i) the handwriting expert also specifically excluded SP1 as the author or signatory of the subject cheques, thereby ruling out the account put forward by the appellant that SP2 had taken blank cheques to SP1 and asked her to sign them, after which SP2 forwarded the cheques to the appellant;

(j) of the 15 cheques, six of them were encashed by the appellant and some of them bore his signature and identification number on their reverse sides;

(k) another five of those cheques were made out in the name of a business in his wife's name, namely Syarikat Anggi;

(l) the rest of the cheques which were made out to other entities had no connection whatsoever with Hazeltron Sdn Bhd, which as stated earlier, was not operational at the material time;

(m) the funds in toto were therefore utilised by the appellant for his own or related benefit;

(n) the appellant did not deny that these monies had been so utilised save to maintain that he had shared half the cash monies with SP2 and that SP1 had authorised these payments.

[41] From the foregoing 'chain' of events it is notable that the appellant has played a key role from the inception of the banking facility until the utilisation of the funds procured by the use of the 15 subject cheques. Can it reasonably be inferred from such a chain of events that it was the appellant who had 'forged' the subject cheques?

[42] A conclusion can only be reached by considering the appellant's version of events against the documentary and expert 'chain' of evidence shown above.

THE APPELLANT'S DEFENCE

[43] The appellant's version of events was that it could not be concluded that the only or incontrovertible conclusion to be reached on the above facts was that he had 'forged' the subject cheques. He argued that the cheques were authorised because they had been signed by SP1. According to him, SP2 was

involved in that it was he who procured SP1's signature on the cheques before handing them to the appellant and therafter received half of the proceeds of those cheques which were encashed.

[44] However this 'defence' was only brought up during the defence case. It was not raised during the course of the prosecution case, with the net result that the aforesaid facts, namely that SP2 had procured SP1's signature on the subject cheques, was never put to SP2 at any time during the course of cross-examination. In this context, the learned trial judge concluded that the failure of the defence to put to SP2 the defence contention that SP2 had procured SP1's signatures on the subject cheques and then shared half the proceeds from the encashment of those cheques, could only mean that the defence was conceived as an afterthought and had no genuine basis. The effect of failing to put the defence case to the prosecution witnesses is explained comprehensively in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 where Edgar Joseph Jr FCJ explained the general principle thus (at p 218):

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention — in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.
>
> ... it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

[45] The trial judge in the instant case came to the conclusion that the defence was an afterthought based on a consideration, inter alia, of the defence put forward by the appellant and an appraisal of other relevant considerations such as the credibility of the appellant, the circumstantial evidence set out above as well as the expert evidence (see also *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 and *AEG Caraoeit v AY Derderaian* AIR 1961 Cal 359).

[46] Finally, the trial judge made a finding of fact to the effect that she disbelieved the appellant and found his evidence to be less than credible. She has outlined her reasons as set out above. Essentially she found the defence

A version of events to be contradictory and the demeanour of the witness evasive. The trial judge had the advantage, which this court did not, of seeing and hearing the appellant and some of the witnesses. In *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49, Lord Diplock said (at p 82):

B > An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

C

[47] It is evident from the evidence on record that either the appellant or SP1 and SP2 are speaking the truth. The trial judge, on the basis of the evidence concluded that SP1 and SP2 were telling the truth. In so concluding she took into account the documentary and expert evidence and weighed it
D against the oral evidence put forward by the appellant. It does not appear, that in so doing, the trial judge has erred or failed to take into account material considerations or ignored serious contradictions in the evidence of the witnesses. Having regard to the trial judge's finding, as well as having appraised the entire appeal record closely there appears to be no reason to
E fault the conclusion reached by the trial judge.

[48] Can it therefore be concluded from the entirety of the circumstances that the only inference to be drawn in this case is that it was the appellant
F who forged SP1's signature on the 15 subject cheques? It appears that these circumstances can and do lead to the indubitable of certain inference that it was the appellant who forged the signatures on the 15 subject cheques. In summary therefore, the circumstantial evidence, expert evidence and documentary evidence considered in totality establish that the learned trial
G judge did not err in arriving at her conclusion of guilt vis a vis the appellant in relation to the charge against him under s 467 of the Penal Code.

Do the 15 subject cheques comprise valuable security under s 467 of the Penal Code?

H

[49] The final element required to be proved under this section is that the document or item 'forged' must fall within the purview of s 467 of the Penal Code. The subject matter of the charge in the instant case comprises the 15 cheques. Section 467 of the Penal Code includes in the series of documents
I which are caught, '... a document which ... purports ... to give authority to any person to receive any money'.

[50] Accordingly the 15 cheques would fall within the purview of the section.

[51] The ingredients required to prove the offence under s 467 of the Penal Code therefore appear to be made out. This ground of appeal fails.

Issue (ii): Were there material contradictions between the evidence of SP1 and SP2 which warranted a rejection of their evidence on the substantive issues before the trial judge?

This issue has to some extent been considered above. However the appellant's specific complaints about the assessment of the evidence of SP1 and SP2 which his counsel submitted as amounting to material contradictions included the following:

(a) That SP1 was inconsistent in her testimony because she initially stated that she did not know anything about the issuance of cheque books or the 15 subject cheques, but in cross-examination said instead that she signed two cheques which were presented to her by the appellant because she believed him. In point of fact, there is no real inconsistency here as it is not in issue that the two cheques were indeed signed by SP1 at the behest of the appellant to enable the payment of legal fees and insurance for the charged property. These two cheques do not comprise a part of the charge against the appellant. Therefore when SP1 maintained that she did not know about the 15 'forged' cheques or the issuance of cheque books, this is borne out by the evidence. SP1 never collected cheque books, while the appellant admitted doing so.

(b) It was also submitted that SP1's testimony should be entirely rejected because in her first information report she had stated that she was not aware of the grant of the overdraft facilities by EON while in her testimony she says that she was aware.

Again this is not a material contradiction because it is not in dispute that after the bank approved the facility, SP1 went to the bank with the appellant and her brother to sign the requisite documentation. While there is no evidence that she was aware of precisely when the overdraft facility was granted to her, she became aware that it had been approved and was operational when she signed the specimen signature card and signed the first two cheques at the appellant's behest. Therefore her statement in her first information report has to be considered in the context of the undisputed evidence related by all the witnesses as to events prior to and upon the opening of the account.

Additionally this evidence relates to matters prior to the issue of the 'forgery' of the cheques and does not impinge upon the evidence central to such forgery. It cannot therefore comprise a material 'contradiction' justifying the rejection of SP1 and SP2's evidence.

(c) Another 'contradiction' raised was that SP2 had maintained that the overdraft facility in SP1's name was for the withdrawal of funds in favour of Hazeltron, unlike SP1's testimony where she had maintained that the facility had been procured purely to assure Hazeltron's clients that it had capital. A reading of the evidence will show that SP2 stated that Hazeltron had no bank account and that SP1's facility was to be utilised for Hazeltron's business.

While there is a difference between SP1 and SP2's evidence in so far as to whether or not the overdraft facility could actually be drawn down for use in the business, such difference is not sufficiently material in the context of the present charge to be construed as a material contradiction. In any event the difference is academic because it is not in dispute, as averred by the appellant himself, Hazeltron was not operational during the time when the subject cheques were 'forged'. Therefore there was never any question of the cheques having been utilised for the benefit of Hazeltron Sdn Bhd. or its operations. As such this 'difference' in SP1 and SP2's evidence is immaterial.

The trial judge in her consideration of the testimony of SP2 concluded that '... In spite of some minor discrepancies in his evidence when cross-examined, his testimony remained quite intact'. She evidently considered these issues and also came to the conclusion that the differences were not so material as to warrant a rejection of their evidence as a whole.

[52] Moreover, no two witnesses can give identical evidence. If SP1 and SP2's evidence had matched identically in all aspects, this in itself would have given rise to suspicion that the witnesses had concocted their evidence.

[53] In *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234 Wan Yahya J (as His Lordship then was) stated (at p 235):

> ... Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly toothcombed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

[54] And in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, Raja Azlan Shah FJ (as His Highness then was) expounded the position in law as follows:

> ... In my opinion, discrepancies there will always be, because in the circumstances in which the event happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened... the question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

[55] As such, this ground bears no merit and also fails.

SENTENCE

[56] Although this issue was not at the forefront of the submissions for the appellant, it is raised in the petition of appeal. Section 467 of the Penal Code provides on conviction for a sentence of imprisonment of up to 20 years and/or the payment of a fine. The trial judge handed down a sentence of two weeks imprisonment and the payment of a fine of RM40,000 failing which a term of imprisonment of five years is to be served by the appellant.

[57] In deciding on this sentence the trial judge states that she took into account the public interest by considering the nature and gravity of the offence, which she characterised as amounting to an abuse of the trust placed in the appellant by SP1. The prevalence of such offences was also considered. As against this she considered the appellant's plea in mitigation and that the appellant had this matter hanging over his head for seven years.

[58] The basis for the imposition of a fine of RM40,000 was that the appellant had caused grave financial loss to SP1. As such the trial judge surmised, '... it is only appropriate that the sentence passed should reflect the loss he had caused ...'.

[59] This reasoning here is less than clear. The grave financial loss suffered by SP1 will not be compensated by the imposition of a fine for RM40,000, as SP1 is not the beneficiary of the fine. In order for SP1 to recover her loss, a civil suit would have to be instituted to recover the monies she has lost.

[60] The fact that the fine 'reflects' the amount of loss caused does not appear to be a sound basis for the imposition of such a sum. There also appears to be no other reason given for the imposition of such a sum by way of fine. Neither is there any reason given for the term of five years' imprisonment imposed in the event the appellant does not pay the fine of RM40,000.

A **[61]** It is at the forefront of my mind that an appellate court should always be slow to interfere with the exercise of discretion by the sentencing judge. However in this instance, where there appears to be no tenable basis for the imposition of that part of the sentence relating to the fine and the term of imprisonment in default of the payment of such fine, this court is constrained
B to set aside that portion of the sentence and substitute instead, a fine of RM5,000 and in default of payment of such fine, a term of imprisonment of three months. The rest of the sentence remains intact namely the term of imprisonment of two weeks. Accordingly, the appeal is allowed in part in relation to sentence only. That part of the appeal relating to liability is
C dismissed. The appellant is therefore sentenced to two weeks imprisonment and a fine of RM5,000 in default of which a term of three months imprisonment is imposed.

Appeal allowed in part.

D

Reported by Sally Kee

E

F

G

H

I